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No. 64.

Sup. of Burkhart & Darlington

for D. C.

Filed Oct. 16, 1902.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1902.

No 64.

HELEN C. RAUB ET AL.

vs.

HELEN C. CARPENTER ET AL.

BRIEF FOR DEFENDANTS IN ERROR.

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Statement.

This cause is here upon two appeals, one from a decree of the Supreme Court of the District of Columbia of June 26, 1900, sitting as an orphans' court, admitting to probate and record the will and codicil of Charles W. Hauptman, and the other from an order of that court, of September 20, 1900, overruling appellants' motion to vacate the said decree because of the alleged incompetency of a juror at a trial of issues to determine its validity. Record, pp. 9–15.

The first of these appeals presents, simply, certain exceptions to the rulings of the trial court, at the trial before a jury of the issues set forth at pages 5 and 6 of the record,

framed under a caveat filed by the appellants to the probate and record of the two instruments, one bearing date the thirtieth day of November, 1896, purporting to be the last will and testament of Charles W. Hauptman, and the other dated April 15, 1898, purporting to be a codicil to the former instrument, both of which are set out at pages 21–25 of the record. The testator died on the 2d day of May, 1899, and the issues present the three questions of mental competency, fraud and undue influence, apart from the formal question whether the former instrument was the last will and testament of the decedent.

The testator, an older brother Francis Hauptman, and Mary E. Hauptman, their sister, all unmarried and somewhat advanced in life, had lived together for many years in the City of Washington. Francis Hauptman first died, leaving a will by which he gave his entire property to the two survivors, whereupon the present appellants employed counsel and instituted a contest to break the will, when, with considerable reluctance, and because of his age and of the strain of the litigation upon the health of his aged sister, the present testator, who was the executor under the will of Francis Hauptman, submitted to a compromise, quite rigorous in its terms, but which it has been deemed unnecessary to print in the record. Thereafter, upon the death of the sister leaving a will purporting to give her property to the present testator, the same parties, who are some of a large number of nephews and nieces, initiated a second contest, employing counsel for the like purpose, and desisting only upon learning that the sister and the present testator held as joint tenants, so that nothing could be gained by any result of the proposed contest. The record shows that the testator, who was a man of mild and amiable characteristics, and who had been a benefactor of the appellants and of their parents through a long series of years, was

much hurt by their conduct, and that he declared to a number of persons, including the caveators' own witness Mary S. Heinecke, that they should be left out of his will. Record pp. 17, 31, 33, 35, 36, etc. The will was prepared by William E. Edmonston, Esquire, at the instance of the testator and from written data furnished by the latter for the purpose, in his own handwriting, which data are set out at pages 30 and 31.

Brief and Argument.

The exceptions to the rulings of the court at the trial presented four questions, one of which related to the order of proof and three to the exclusion of certain testimony, these being the only questions covered by the first appeal, namely, that from the decree of the Orphans' Court, of June 26, 1900, admitting the will and codicil to probate and record. These four questions are set out and discussed, *seriatim*, in the opinion of the Court of Appeals, at pages 47–50. Only the second of them seems to be relied upon or referred to in the opposing brief in this court, and was as follows:

Dr. George B. Heinecke, a physician and a great-nephew of the testator, gave, in the first place, some testimony as to the testator's health, showing that he had suffered from urethral calculus, which ailment, however, he could not connect with any effect upon his brain, and that he had had attacks of epilepsy subsequently to the execution of the will and codicil. In the second place, he testified to two trivial circumstances in the testator's life, namely, that on one occasion he had seen him laughing to himself, and that, on the occasion of the great blizzard of 1899, he was surprised at the quantity of snow which had fallen in his yard and wished to have it removed; and, in the third place, he testified to the result of an autopsy after the testa-

tor's death, and to the cause of his death. Thereupon, he was asked the following question :

> " Doctor, have you formed any opinion from your uncle's general condition of health, and the conditions disclosed by his brain at this investigation, and *from all that you know about him yourself*, what his condition of mind was? "

The caveatees objected to that portion, only, of the question which called for the witness' opinion based upon " all that you know about him yourself," on the ground that no sufficient basis had been laid for that portion of the question, and that the facts relied upon in that particular should be first brought out. The counsel for the caveators declining to accede to this suggestion, or to develop the facts known to the witness about the testator upon which he was asked in part to base his opinion, the trial court sustained the objection, and, it is respectfully submitted, was unquestionably correct in so doing.

The condition of the testator's mind was one of the questions to be determined by the jury ; and while, concededly, it was competent for witnesses, whether medical experts or laymen, to state any facts known to them which would reflect light upon his mental capacity, and to follow this with an expression of their own opinions upon the subject, it was not competent to permit any witness to state an opinion based upon his alleged or assumed personal knowledge of facts concerning the testator, not only without disclosing, but refusing to disclose, the facts or knowledge upon which that opinion rested.

The remaining questions involved in the appeal from the decree of June 26th, being apparently abandoned in this Court, will not be discussed.

II.

The only remaining question in the cases is as to the propriety of the action of the Orphans' Court in over-ruling a motion to vacate its decree admitting the will and codicil to probate and record, with grant of letters testamentary to the executor, and to allow a new trial, because of the disqualification of one of the jurors who sat in the case.

Upon this question, the facts as shown by the record are as follows:

At the organization of the jury for the month of June, 1900, the trial justice propounded to the jurors the usual inquiry whether they were citizens of the United States, residents of the District of Columbia, over 21 and under 65 years of age, and whether they had ever been convicted of a felony or a misdemeanor involving moral turpitude, to which questions all the jurors responded that they were such citizens and residents, between the ages named, and that they had never been so convicted. At this first day of the jury term, the counsel for the caveators was present, and witnessed the proceedings just narrated. When the issues in this case came on for trial, June 13, 1900, the jurors were not put upon their *voir dire*, nor examined by either of the parties; but what is known as a long panel was struck—*i. e.*, the clerk drew by lot twenty names from among the jurors, each of the parties struck off four, and the remaining twelve were duly impanelled, among the twelve being one George G. Lewis.

On the 15th day of June, the jury found all the issues in favor of the will (Record, pp. 7–8); and, no motion for a new trial having been made, the Court on June 26, 1900, passed its decree admitting the will to probate and record and granting letters testamentary to the executor, from which decree the caveators noted an appeal. On the 16th

day of July, 1900, one month after the verdict and nearly three weeks after the decree, the caveators moved the court to vacate the latter and grant a new trial on the ground that the juror Lewis was under 21 years of age, and that he had been convicted of petty larceny on March 20, 1895.

On September 20th, this motion was presented to the Orphans' Court, and overruled, the order stating, among other things, that, in the opinion of the court, there was no evidence at the trial of mental incompetency, fraud or undue influence; and it is this second appeal, from the order of September 20, 1900, which presents the question mainly relied upon in this Court.

It is respectfully submitted that the contention of the plaintiffs in error is untenable, upon three distinct grounds, namely:

1. The motion for the new trial was made too late.

2. The objection to a juror because of his disqualification, comes too late after verdict.

3. The motion for a new trial, upon the ground stated, was a motion addressed to the discretion of the court, from which no appeal lies,—and which discretion, moreover, was rightly exercised.

1.

Rule 53 of the Supreme Court of the District of Columbia provides: "Every motion for a new trial must be made without four days, exclusive of Sundays, after verdict, and shall be in writing, and shall state, in separate paragraphs, successively numbered, the specific grounds upon which it is based, and it shall be entered on the minutes of the court on the day it is presented to the court. Judgment shall not be entered on the verdict until the fifth day thereafter, exclusive of Sundays; or if a motion in arrest of judgment or for a new trial shall be made, until after the ruling of the court on said motion."

Unless a motion for new trial is filed within four days after verdict, it cannot be considered (U. S. *v.* Angney, 6 Mackey, 66, 77).

In the case at bar, as stated, no motion for a new trial was filed within the four days, nor, indeed, until more than a month after the verdict had been rendered. On the 26th day of June, eleven days after the verdict, the orphan's court had accordingly rendered its final decree, admitting the will to probate and record, and granting letters testamentary to the executor. It was not until twenty days after this action of the court that the motion for a new trial was filed, nor was it presented to the court for action for upwards of sixty days after the last named date.

In the absence of a motion for a new trial seasonably filed, there is no provision for an application to the court for an allowance of a new trial, except under the Act of Maryland of 1787, Ch. 9, Sec. 6, to set aside a judgment for fraud, deceit, surprise or irregularity *in obtaining the same*. Spalding *v.* Crawford, 3 D. C. App., 361, 366–7. And this remedy is limited to cases in which the judgment, as stated, has been obtained by either fraud, deceit, surprise or irregularity, neither of which is alleged in the present case. The claim is that Lewis fraudulently obtained the privilege of serving upon the jury; but it is not and can not be claimed that the judgment was obtained through this means, or that it is in any sense a fraudulent judgment.

2.

In the second place, we submit that the objection that a juror was disqualified comes too late after verdict, especially in a civil case, and where the disqualification is, not *propter affectum* but *propter delictum*.

The position of the plaintiffs in error is that the juror Lewis was incompetent, and therefore a *non-juror*, or no

juror at all; and that, consequently, the plaintiffs in error have been deprived of their constitutional right to have the issues passed upon and determined by a jury of twelve men.

As pointed out in 1 Thompson on New Trials, Sec. 116, some of the American authorities have followed Shane *v.* Clark, 3 H. & J., 101, 103, holding the disqualified person to have been a non-juror, etc., and these are the authorities in support of their proposition which will be found in the brief of plaintiffs in error, namely, Shane *v.* Clark, 3 H. & J., 101; Herndon *v.* Bradshaw, 4 Bibb, 45; State *v.* Babcock, 1 Conn., 401; Briggs *v.* Georgia, 15 Vt., 61; Garratt *v.* Weinberg, 54 So. Car., 127. In others of the cases cited on behalf of the plaintiffs in error, the objection is sustained in favor of life and liberty, the cases being indictments for crime, and the courts declaring that a different rule prevails in civil cases. U. S. *v.* Angney, 6 Mackey, 66; State *v.* Babcock, *supra.*

Still other cases draw a distinction between disqualification *propter affectum*, involving bias, interest and prejudice, and disqualification *propter delictum*, holding the former available after verdict, but the latter not so. Thus, in Sellers *v.* People, 4 Ill., 412, a juror had declared that the prisoner would and ought to be hanged, and that nothing could save him, but had, nevertheless, visited the prisoner in jail and declared that he ought not to be hanged, and would not be if he should be on the jury, apparently with no other object than that of being enabled to serve on the jury and aid in a conviction. When the panel was being selected, the juror in question swore that he had neither formed nor expressed any opinion. A new trial was granted, not on the ground that the juror swore falsely when being examined, but on the ground that he had pre-judged the case and was not an impartial juror. So, in Essex *v.* McPherson, 64 Ill., 349, the new trial was

granted on an unsuccessful plaintiff's motion, on the ground that one of the jurors had had an outstanding wager that the defendant would win the case, thus being interested in the verdict against the plaintiff. So, in Moore *v.* Mutual Insurance Company, 107 Ga., 199, the new trial was granted because six of the jurors were near relatives of parties pecuniarily benefitted by their verdict; and in State *v.* Brockhaus, 72 Conn., 109, the court, in terms, distinguishes between disqualifications *propter affectum*, affecting impartial and honest action, and disqualifications *propter delictum*, not substantially affecting the impartiality of the jurors, and declaring the law settled that, as to the latter, "a strictly technical qualification of a juror fixed by statute is a qualification the want of which is healed by verdict."

But, as pointed out in 1 Thompson on New Trials, Sec. 116, the mass of American authority, grounded upon convenience and public policy, opposes the view set up in Shane *v.* Clark, and supports the doctrine that such disqualification, even when *propter affectum*, is not, *per se*, a ground of new trial, though it *may be* such in the discretion of the court.

It is further to be noted that, except in Vermont and South Carolina, the authorities relied upon in support of the objection are early cases, which have been either expressly overruled by later decisions in the same States, or are inconsistent with the later decisions in those States. Thus, Shane *v.* Clark is practically overruled by Johns *v.* Hodges, 60 Md., 215, and by Young *v.* State, 90 Md., 517; Herndon *v.* Bradshaw, 4 Bibb, 45, is overruled in effect by Presbury *v.* Commonwealth, 9 Dana, 203, 204, and State *v.* Babcock, 1 Conn., 401, by Sellech *v.* Turnpike Co., 13 Conn., 453, and by State *v.* Brockhaus, 72 Conn., 109. As to Briggs *v.* Georgia, 15 Vt., the Supreme Judicial Court of Massachusetts, speaking through the late Mr. Justice Gray,

declared, in Wassum *v.* Feeney, 121 Mass., 93, that the dissenting opinion correctly stated the law, and State *v.* Brockhaus, 72 Conn., 109, is to the same effect.

Wassum *v.* Feeney is cited and approved by this court in Kohl *v.* Lehlback, 160 U. S., 203, 301-2, holding the great weight of authority to be to the effect that disqualifications *propter delictum*, although not known until after the verdict, are not fundamental as affecting the substantial rights of a party, even in criminal cases, and that the verdict is not void for want of power to render it.

To like effect may be cited King *v.* Sutton, 8 B. & C., 417; Hill *v.* Yates, 12 East, 229; State *v.* Davis, 80 N. C., 412; Wilder *v.* State, 25 Ohio, 355; Greenup *v.* Stoker, 3 Gilman, 202; Chase *v.* People, 40 Ill., 352; McClure *v.* State, 1 Yerg., 206; Brewer *v.* Jacobs, 22 Fed. Rep., 235; U. S. *v.* Folsom, 36 Pac. Rep., 70, and Amherst *v.* Hadley, 1 Pick., 38; Chase *v.* People, 40 Ill., 355.

3.

In the last place, it is submitted that, (*a*) in any event, the application for the new trial, even had it been made in time, was an application addressed to the discretion of the court, admitting of no appeal, and, further, (*b*) that that discretion was rightly exercised.

(a.)

In Presbury *v.* Commonwealth, 9 Dana, 203, 204, cited in opposing brief, the case was one of alienage of a juror, not discovered until after the trial. The court said:

> "The granting of a new trial, after a verdict of twelve men, is a question addressed to the sound discretion of the court, and should not generally be granted if the justice of the cause has been attained, or rather, if there be no reasonable ground to believe that justice has not been done."

In Kohl *v.* Lehlback, 160 U. S., 301–2, above cited, this court, holding the disqualification of a juror *propter delictum* not to be fundamental, or to render the verdict void, adds: "Whether, where the defendant is without fault *and may have been prejudiced*, the new trial may not be granted on such a ground is another question."

In King *v.* Tremearne, 5 B. & C., 254, one had served as a juror who was not on the panel. *Held* that, if he had been on the panel, perhaps objection should have been made before verdict, but that, under the particular circumstances of the case, and even then upon the ground of a sound discretion, the rule for a new trial should be an absolute one.

In Johns *v.* Hodges, 60 Md., 215, two of the jurors were under age; *Held*, that the motion for new trial for this defect was an appeal to the court, resting wholly in its sound discretion, and its exercise of which was not the subject of appeal; and that, as a rule, such an objection after verdict comes too late, notwithstanding the fact that the disqualification may not have been discovered earlier.

In Young *et al. v.* State, 90 Md., 579, the trial was for murder, and the jurors upon their *voir dire* had stated that they had not formed or expressed any opinion as to the guilt or innocence of the prisoners. While the trial was in progress, it was learned that one of the jurors, as foreman of the coroner's jury, had concurred in and presented its verdict that the deceased came to his death from the effect of a pistol shot wound, and that the prisoners were implicated in the shooting, whereupon the objection was forthwith made, before the State's evidence was in. *Held*, that the objection, being made after the jury was sworn, came too late. "If his presence on the jury resulted detrimentally to justice, the Court, after the verdict, was fully empowered to grant a new trial."

So, 1 Thompson on New Trials, Sec. 116, states: "In England, and in many American jurisdictions, a paramount

inquiry upon such an objection is, whether it has resulted in an *unjust verdict*; if not, the objecting party has sustained no injury, and the new trial will not be granted in order that public and private time may be consumed, and the danger of other irregularities incurred, when the same result must, on a just view of the evidence, be reached. Unless there is plain evidence of injustice done to the party complaining, the verdict should be allowed to stand," citing numerous authorities.

A new trial will not be granted because of disqualification of a juror, not discovered until after trial, unless it be made to appear that there was no want of due diligence on the part of the party complaining of the verdict, and it must also be made to appear that injury resulted to him by reason thereof. Triplett *v.* State, 1 Tex. App., 651; Roseborough *v.* State, 43 Tex., 574.

(b.)

If, however, this discretionary power of the court were reviewable, it is respectfully submitted that, in the present case, it was rightly exercised.

In the first place, it cannot escape observation that no offer to show that the discretion was abused, or that any injury or injustice has been suffered by the appellants, is attempted by or on behalf of the plaintiffs in error.

In the second place, the record shows that a verdict for the will was directed by the court, without objection, upon the issues touching fraud, undue influence and circumvention. The only remaining question was that of mental incompetency; and any question as to the proper exercise of its discretion by the trial court, therefore, presents only the inquiry whether the fact that one of the jurors lacked a few months of being 21 years of age, and had been convicted of larceny when he was 15 years old, should require a new trial of the question of the testator's sanity, when,

as is stated in the order appealed from (Record pp. 14–15), there was no evidence in the case upon which a verdict against the mental capacity of the testator could have been sustained, if rendered.

An examination of the testimony set forth in the record will abundantly sustain this view of the trial justice, even independently of the fact that the court below had the better opportunity of seeing the witnesses, observing their manner of testifying, and weighing their testimony.

Of the witnesses produced on behalf of the caveators, Mrs. Heineke (p. 16) testified that she had never heard the testator's mental capacity questioned in his lifetime, although everybody she knew, knew him, and that she had never heard his mental capacity questioned since his death by anyone except by the caveators. Dr. George B. Heineke (p. 18) testified that urethral calculus, the only disease he knew the testator to have suffered from until after the execution of both the will and codicil, could not be connected with the condition of his brain, as shown by the autopsy, and gave no opinion adverse to his mental capacity. Dr. Howard H. Barker (p. 27), his family physician, testified simply to the urethral calculus, that it was no indication of mental unsoundness, that he knew the testator from about the first of April, 1892, to the first of April, 1898, during which time he never saw anything wrong with him, either mentally or physically, with the exception of the physical ailment referred to. Dr. Norman R. Jenner (p. 17) who attended him professionally shortly before his death, testified that he saw nothing to indicate that his mind was not all right, that he answered intelligently all questions the witness propounded to him, and that the witness saw no indication that his mind was unsound, while Dr. George N. Perry (p. 28), the attending physician during the latter part of testator's life, testified

that he had frequent conversations with him, and that he had but one opinion, namely, that he was perfectly sound and rational up to a short time before his death. These were the only witnesses produced by the caveators who ever knew or saw the testator in his lifetime, with the exception of Mr. Edmonston (p. 30), whose examination by them was confined to testimony concerning the extent of the assets of the estate.

An autopsy was performed upon the testator's brain, for the purpose, as shown by the testimony of his attending physician and relative, Dr. George N. Perry, called as a witness on behalf of the caveators, of ascertaining the cause of certain convulsions which preceded his death. Record p. 28. The autopsy was performed by Dr. D. S. Lamb, in the presence of a number of other physicians, Dr. Lamb testifying that, from the conditions found, he could not undertake to say that the testator was of unsound mind or incapable of transacting business.

The only other witnesses called by the caveators were Drs. R. S. Lamb and Irving C. Rosse, testifying simply as experts as to the conditions disclosed by the autopsy. These conditions (Record, p. 19), were as follows:

> "Artery of brain extremely atheromatous, stiffened, brittle, standing wide open cut, brain general atrophied and pale; increase of subarachnoidal fluids, lateral ventricles dilated; some small cysts in left internal capsule and optic thalamus; a few small cysts in centrum ovale majus; cause of death, anæmia of brain."
>
> "Brain not kept."

Dr. R. S. Lamb testified that, in his opinion, the brain was "rather unhealthy," and that the disease producing the above conditions had been progressing from eight to ten years prior to death, but stating no opinion as to its effect upon the testator's mental capacity.

Dr. D. S. Lamb (Record, p. 26) testified that the atrophy was "general" in the sense that the shrinking was about general, there being no particular place in which it appeared more evident than in others; that this atrophy is usual in old age, and applies to nearly all the organs of the body; that it was not possible to tell from the examinations in this case, where the condition was a general wasting, whether the mind was sound or unsound; that, as to the small cysts of the optic thalami, entire paralysis of one of those organs of the brain would have had no practical effect on the intellectual faculties; that he found nothing in the condition of the brain not due to ordinary changes of advancing age; that it was not a case of premature old age, and that the increase of subarachnoidal fluids, referred to in the result of the autopsy, was simply an increase resulting from the atrophy of the brain.

It will be seen that, up to this point, there was absolutely no scintilla of evidence of any mental unsoundness, and that, on the contrary, there was the strongest evidence, both of physicians and of others, that the testator's mind was perfectly sound; that, among all the persons who knew him, no suggestion of incapacity was made while he lived, and none by anybody after his death except by the appellants, who had been ready to contest the wills of Francis Hauptman and of Mary E. Hauptman as well, if they could profit pecuniarily by so doing—and yet no one of whom could be found willing to take the stand as a witness in the case, to attack or question the testator's capacity.

The testimony of Dr. Irving C. Rosse will be found at pages 31 to 33 of the record, and, it is submitted, although he does state that the report of the post mortem examination, in his opinion, indicated a progressive disease of the brain, and that he "should say" it indicated an unsound mind, his testimony as a whole does not strengthen the

caveators' situation. He nowhere says that the unsoundness which he "should say" existed, was sufficient to incapacitate the testator from transacting his business affairs or from making a valid will, deed or contract; while the grounds, theories and conditions of knowledge from which he testifies, as disclosed by his cross-examination, render his testimony still more inconsequential.

He states, for example, that the atheromatous condition of the blood vessels, which is the first indication of mental unsoundness he finds in the report of the autopsy, does not always involve mental unsoundness; that the diminution of nutrition through atheromatous conditions of the arteries is not the only reason why it affects the mind, and that he does not know any other way in which atheromatous conditions could affect the mind except through diminution of the blood supply; that the next indication of mental unsoundness in the report of the autopsy was the general atrophy of the brain; that the mind is unsound whenever the brain is atrophied; that the brain is atrophied by age as well as the other organs of the body and that such atrophy results naturally from advancing years; that old age produces marked atrophy of the brain, and that he cannot fix any average age at which this begins, not because this is not fixed in medical science, but because he, the witness, does not know; that he cannot tell within twenty years of the time at which atrophy of the brain without disease is naturally to be expected; that the third reason for supposing there was mental unsoundness rests upon the fact of the small cysts on the left internal capsule and left optic thalamus; that he does not know the functions of either of these parts of the brain, or whether there is any doubt in the medical profession as to what their functions are; that he does not know the location in the brain of the optic thalami, and that, in view of the fact, admitted by him, that one

whole hemisphere of the brain might be paralyzed, the internal capsule and optic thalamus included, without impairing the mind, the existence of a few cysts on one side would not indicate mental unsoundness; and he is finally driven to rest his conclusion upon the fact, claimed by him, that "most bodily ailments will affect the mind, and that a bad cold or a toothache, taken in connection with other things, would tend to confirm witness' impression of the testator's mental unsoundness." He further testifies that the division of the brain into a right and a left hemisphere is merely an arbitrary division, which does not exist in nature; that one hemisphere of the brain might be entirely removed and the mind be wholly preserved; that he knows of an instance where one hemisphere was diseased and replaced by pus, the man's mind remaining sound: and that one side of the brain is sufficient for the performance of the mental faculties.

On the other hand, Drs. Edmund L. Tompkins and A. B. Richardson, specialists in brain and nerve diseases, the latter Superintendent of the Government Hospital for the Insane, testify, what all know, that the division of the brain into a right and a left hemisphere is no more arbitary than the division of the lower part of the body into a right and a left leg; that the location of the optic thalami in the brain is no more obscure or doubtful than the location of the foot on the leg; that the existence of cysts in one optic thalamus or internal capsule would not affect the thinking powers of the brain, and that neither of those organs has anything to do with the intellectual faculties or thinking parts of the brain; they concur with Dr. Lamb that the condition of the testator's brain, as disclosed by the report of the autopsy, indicates nothing whatever with regard to the testator's mental soundness; they state that there is no connection between toothache and mental unsoundness,

or between a cold and mental unsoundness, and that there is nothing which could be taken in connection with toothache or a cold in determining the soundness of a man's mind, etc.

This brief will not be protracted by summarizing the testimony of the fourteen witnesses, in addition to those who attested the will, offered by the caveatees, and who testify to the complete intelligence, capacity and mental soundness of the testator. It is entirely apparent that there was no "scintilla of evidence," no conflict of testimony "about which reasonable men could differ," and nothing which could by any possibility have led to a different result, no matter how the jury was constituted, or which could lead to a different verdict before any future jury which could be empanelled.

The court must have directed a verdict upon all the issues if requested, and, as is disclosed in its order overruling the motion to vacate the decree, would readily have done so. To argue that, under these conditions, the denial of the motion was either an abuse or an erroneous exercise of the judicial discretion, is superfluous.

It is respectfully submitted that the decree and order appealed from should be affirmed.

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